Supreme Court, U.S.
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No.

In The

SUPREME COURT FOR THE UNITED STATES

October Term, 1996

LAZAR KUMPAN,
Petittioner

vs.

UNITED STATES OF AMERICA
Respondent

Petition for a writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

Charles H. Magnuson
Counsel of Record
10866 Wilshire Blvd.
Suite 1270
Los Angeles, CA 90024
(310) 475-0855

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a summary dismissal for lack of subject matter jurisdiction of a complaint and action brought by petitioner in seeking a refund of federal excise taxes and relief from an unauthorized governmental disclosure of tax information, wrongfully deprived petitioner of due process guarantees when the court of appeals, without allowing for oral argument, accepted the adoption by the trial court of findings and conclusions from the government, that, despite its absolute dominion and control over funds previously taken from petitioner pursuant to criminal tax proceeding, presented a format for concluding there was a lack of payment toward a subsequent federal excise jeopardy tax assessment and did not in any respect make reference to the unauthorized disclosure claim.

2. Whether the summary determination to dismiss the subject action and complaint for lack of tax refund subject matter jurisdiction on the reasoning that substantial funds originally seized from petitioner by the Internal Revenue Service were as asserted by the government to have been held as evidence and not processed as a collected tax payment is, by admissions within the answer to the subject action and complaint and through newly discovered evidence, so contradicted, that the position taken by the government and

affirmed by lower court rulings, that, even though the funds were held pursuant to a jeopardy assessment the holding did not represent a tax payment for establishing refund suit jurisdiction, deprived the petitioner of due process in not allowing for the plenary opportunity to develop a record for his position through cross examination and in not allowing for oral argument on appeal in order to explain his position.

3. Whether in view of the record below the issue of payment was as a matter of law admitted so as to preclude the submission of the payment issue upon motion for summary judgement whereby in absence of a plenary hearing due process was denied at least in the form of a suppression or withholding of evidence particularly where as is now found within the discovery process of a succeeding pending refund suit involving the same divisible excise tax assessment and liability there was in existence at the time of the instant action an examination report written by the Internal Representative who in reviewing the subject claim for refund recited that the claim should be denied and that the very funds at issue having been seized were applied to the taxpayer's account and despite and contrary to such existence and his significant participation within the refund claim review process a declaration form this agent was not submitted or relied upon by the government in the filing its summary motion judgement nor had the claim report had been mailed to petitioner by the Internal Revenue

Service.

4. Whether the trial court in failing to address or rule on the unauthorized disclosure claim presented by petitioner and the appellate court affirmance of the dismissal on other grounds deprived petitioner of the right to have relied upon statutory rights with respect to an unauthorized disclosure enforced upon the Internal Revenue Service as allowed by Internal Revenue Code Section 7431 (Title 26 U.S.C).

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are as shown by the case caption and include the petitioner, Lazar Kumpan, and the United States of America.

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Appendix A -- November 8, 1996 Memorandum, United States Court of Appeals for the Ninth Circuit.....

Appendix B -- October 30, 1995 Statement of Unconroverted facts and Conclusions of Law, United States District Court, Central District of California.....

Appendix C -- October 30, 1995 Judgement, United States District Court, Central District of California....

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OPINIONS BELOW

The November 8, 1996 Memorandum Decision of the Circuit Court (App. A, infra) affirming the Dismissal by the District(App. B, infra) for lack of subject matter jurisdiction of the Circuit Court is unreported. The October 30, 1995 entry of Judgement and Statement of Uncontroverted Facts and Conclusions of Law of the District Court are unreported.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth circuit entered an opinion departing from accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.
The United states court of appeals for the Ninth Circuit entered its unpublished opinion affirming the district courts dismissal for lack of jurisdiction of subject matter of the action by petitioner in seeking a refund of federal excise tax and damages for unlawful disclosure of tax return information on November 8, 1996 and on December 31, 1996 provided a certified copy of Decree of Court to the district Court for the Central District of California.

The basis for jurisdiction rests upon Article V of the Constitution of the United States and provisions of Sections

1254(1), 2101(c) of Title 28 United States Code.

Article V of the United States Constitution provide that no person shall be deprived of property without due process.

STATUTORY PROVISIONS INVOLVED

Section 7422 of the Internal Revenue Code (26 U.S.C.) as to the bringing of a federal tax refund suit is set forth within the Appendix. See Title 28 U.S.C. Sections 1340 & 1346. The Appendix provides as well the provisions of Section 7431 of the Internal Revenue Code(26 U.S.C.) for the bringing of an unauthorized disclosure of tax information damage suit. Other code provisions within the Appendix are with respect to Section 6103 as to disclosure of returns and return information, Section 6532 as to the limitation period for bringing taxpayer suits and Section 6611 as to interest on an overpayment of tax.

STATEMENT OF FACTS

In affirming the District court and relying upon the full payment rule of Thomas v. United States, 755 F.2d 728, 729 (9th Cir. 1985), an income rather than divisible excise case, the Circuit Court in referring to a seizure of cash for petitioners apartment concludes without

referring to intervening events extending over a two year period that the seized cash that a search warrant did not constitute collection or payment of tax. Petitioner never so contended and does not do so through this petition.

The District Court in adopting a Statement of Uncontroverted Facts proposed by the government entered its Judgement without benefit of trial or an allowance for cross examination and entering such findings that are upon examination in realty conclusions that are unsupported by a rational reading of the Statement. Since the statement in turn rests upon declarations proposed by the government that are more argumentative than factual the result is a circumstance where the petitioner has been denied due process through the preclusion of a plenary proceeding.

The Statement recites in the first paragraph that the sum of $64,367.00 was being "held as evidence". The referenced declaration does not so state nor is there any submission to the court that supports this argumentative and conclusive recital. Having adopted the "evidence" concept within the first statement paragraph the remainder of the statement relates to further references that are either contrary to existing authority or are not supported by any existing rulings. Equally damaging to petitioner's right to a plenary proceeding are the following references that are not in context with the entirety of circumstances that were before the District Court.

The trial court recites as fact that the funds were in a safe deposit box maintained by the Internal Revenue Service Criminal Investigation Division, there was no Collection Division levy and the sum was not recorded as a payment. It is significant that there is no explanation that this bookkeeping lapse does not allow for the conclusion there was no payment. Then in statement paragraph six the "evidence" reference is again inserted but in this context the reference is to an arrest of petitioner on March 2, 1993. As is shown and to be further explained in this statement, the cash, despite the dismissal of the criminal complaint on March 19, 1993, was not refunded and returned to petitioner until June of 1995. The reason for not returning the fund upon the filing of an Emergency Motion for Return of Seized Property on April 23, 1993 was because of the intervening Excise Tax Jeopardy Assessment by the IRS on May 3, 1993. The statement argues that the despite the assessment, there was no Collection Division collection; therefore no tax payment. This statement is contrary to rulings within its own circuit and does not take into account the collection powers exercised by special agents.

A February 1, 1993 supporting affidavit relating to the March 1, 1993 application for a criminal complaint and search warrant suggests that petitioner had been under surveillance by the IRS for over 17 months since October 5, 1992. (DR 8 at 29,36 37, ER 0010, 0102, 0109, 0110, 0243, 0244) As is also outlined by a March 2, 1993 affidavit from Special Agent Jackson

in support of an application for a search warrant, his arrest and the seizure of his money related to an IRS Form 637 and a single fact that Appellant had been present during a meeting at Cosby Oil where the Form was identified as being in the name of Roadway Motor Plazas. (DR 8 at 33, 47, 50, DR 14 at 18, 21, ER 0110, 0123, 0244, 0270)[1] Each affidavit refers to a business address for Roadway and the use of cashiers checks to purchase diesel fuel from Cosby Oil. (DR 8 at 29, 34, 47, DR 14 at 18 ER 0102, 0107, 0120, 0236, 0241, 0267)

Despite a lack of any incriminating evidence petitioner was arrested by IRS agents in his Los Angeles apartment on March 2, 1993 at gun point. (DR 7 at 29, ER 0063). Following his arrest and a seizure of his property and money, he was personally identified in a widely circulated newspaper account of the event as a party to a motor fuel tax evasion operation. (DR 7 at 29, ER 0063) The news story states how authorities said that "tax evasion seem to be the special province of newcomers from the old Soviet Union" (95-55029 DR 12 at 5, ER 00340 Petitioner is a naturalized citizen from Russia. (DR 1 at 8, ER 0008)

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[1] A copy of what is understood to have been the exemption certificate form presented at the meeting was provided to Appellant's criminal counsel by AUSA Harris and is attached to the complaint as Exhibit 1. (DR 1 at 17, E 0017)

Petitioner learned of an additional article printed in the March 8, 1993 edition of the Oil Express Magazine (DR 25 at 5,15, ER 0191,0201) where he was again named as a target of an IRS swoop "as part of a statewide crackdown on diesel fraud." (DR 25 at 15, ER 0201)

Petitioner declared under oath and without contradiction that he had never been to the Roadway office, did not use the office, did not lease the office and knew nothing of its content or who worked there. (DR 7 at 31, ER 4) He also stated that he did not purchase the cashiers checks and never involved himself in the purchase of diesel fuel from Cosby Oil. (DR 7 at 31, ER 4)

There was nothing within the content of any government declaration suggesting that petitioner was armed or was a type of person known to use or carry or even own a weapon, was dangerous or was a type of person who was violent, became violent or in any way was known or even understood to be a person who needed to be approached with extreme caution.

The Report Commencing Criminal Action falsely indicated that petitioner was in custody on another conviction. (E 0248, DR 25 at 6, ER 0192)

On being arrested, petitioner was then confined after processing and the making of an appearance before a magistrate at the United States Court House within a jail facility. At 2:00 AM he was awaken and removed to another cell where he was housed for several days with another prisoner accused of bank robbery and

murder. (DR 25 at 4, ER 0190) Petitioner had been arrested even though he had also been issued a February 23, 1993 grand jury subpoena for his appearance on March 9, 1993. (DR 25 at 7, ER 0193)

Then on March 19, 1993 the criminal complaint as to petitioner was dismissed (DR 8 at 26,65, ER 0099,0138). He then filed his April 23, 1993 Emergency Motion for return of seized property (DR 8 at 16, ER 0089) It was within this motion the criminal counsel, Mary Gibbons, advised the court that upon information from Special Agent Jackson the IRS was considering a jeopardy assessment to retain control of petitioner's money. (DR 8 at 27, ER 0100)

Thereafter, and on May 3, 1993 a notice of the Jeopardy assessment with respect to the subject excise taxes was issued to petitioner at his Los Angeles apartment. (DR 1 at 19, ER 0019) On June 15, 1993 the Internal Revenue Service issued its amendment to the jeopardy assessment amending its earlier reference to the Tax Court and explained how a refund claim may be filed and rather than a petition to the Tax Court, a Code section 7422 refund action may be appealed to the courts. (DR 1 at 22, ER 0022)

Then on October 4, 1993 an OSC hearing was held before United States District Court Judge Davies in the criminal proceeding concerning the dismissal of the return of property action. (DR 1 at 18, ER 0018) Mary Gibbons and AUSA Mark Harris were in attendance. Nothing is reflected

or even suggested from the minute order that funds were being held as evidence or for any purpose other than with respect to the tax assessment. An assessment made under Internal Revenue Code jeopardy provisions obviously put into force by the very Special Agent having the dominion and control over appellant's money. It is at this point the government had in substance collected the assessed tax.

While petitioner had submitted his written protest to the jeopardy assessment on October 26, 1993 the Internal Revenue Service responded on October 26,1993 by rejecting his position and affirmatively stating there was evidence to support the assessment. (DR 1 at 23, ER 0023) Nothing is stated by the IRS that the subject taxes had not been seized, collected or paid.

It is also to be noted how in her declaration that Special Agent Jackson identified her status as an Internal Revenue Service representative but referred as well to her individual expertise and knowledge of the Internal Revenue Code and it's operative provisions. (DR 8 at 29, 32, 33, 39, 42, 45, 46, 52, DR 14 at 13, 16, 17, 23, ER 0102, 0105, 0106, 0112, 0118, 0119, 0125, 0236, 0239, 0240, 0262, 0265, 0266, 0272)

As allowed by law, the petitioner, on March 23, 1994, filed his refund claim with the IRS in order to seek a refund of the collected tax and an abatement of the underlying assessment (DR 1 at 7, ER 0007). It is this claim that is the

subject matter of this case and it this claim that provides the circumstances for the bringing of the subject refund suit and identifying the unlawful disclosure of tax return information sources as set forth within paragraph 2 of the refund claim declaration. The refund claim filing requirement for asserting grounds for recovery is identified within paragraph 9 of the complaint filed with the district court.

Nearly two months thereafter a letter to AUSA Mark Harris dated May 6, 1994 relates to the efforts to have returned to petitioner all of his property. (DR 7 at 23, ER 0057) The second paragraph of this letter demonstrates that in speaking with the Special Agent she continued in her responses to inquiries that she had no items belonging to petitioner. This effort was part of the continuing struggle to have all of his property returned to him. (DR 7 at 14,21, ER 0048,0055). In short, there was never a suggestion that the funds collected from petitioner were being held for any purpose other than with respect to the tax assessment or for that matter were set aside in a safe deposit box.

Of course the IRS was not in every respect candid about what it was doing and responded to inquiries in a manner that would benefit what ever attitude was to be taken at a given moment. Responding to a Freedom of Information Request (DR 7 at 10, ER 0044) the IRS first stated that access to files was exempt from disclosure. (DR 7 at 13, ER 0047) An

appeal of that response (DR 7 at 18, ER 0052) caused the IRS to then state that their understanding was that documents were under the jurisdiction of the Executive Office of the U.S. Attorney's Office. (DR 7 at 25, ER 0059) It follows that the IRS had no information to support its jeopardy assessment and provided no administrative documentation of any kind or a statement that property of the petitioner were other than within the jurisdiction of the U. S. attorney's office. There was never any assertion from the office of the United States Attorney that petitioner's funds were being held as evidence at any location and certainly not within a CID safe deposit box.

Eventually an Administrative level meeting on August 11, 1994 revealed that the IRS had a concern about the source of petitioner's funds. (DR 7 at 26, ER 0060) Petitioner responded by explaining their source and asking for their return. (DR 7 at 26,27,28, ER 0060,61,62) Again nothing was said about not having the funds, about not collecting the funds or that there had not been an excise tax payment. There certainly was no suggestion that money was being held as evidence or even by CID.

After the passage of the statutory period for allowing for the pendency of a claim the petitioner was then able to file his refund suit and did so on March 25, 1995. In response, the government admitted in its answer that the required amount of tax had been paid. (DR 2 at 2, ER 0027)

In the midst of his effort to have his property returned and the collected tax refunded, petitioner was also confronted with a May 24, 1995 letter from Citibank consumer credit services informing him of a denial of his credit card request. The denial was brought about because of a consumer credit report. The credit report, in turn, provided information about the filing of a federal tax lien. (DR 25 at 5,16, ER 0191,0202)

At the same time and as shown from the declaration of petitioner's counsel, there was never an occasion in discussing the return of property with governmental representatives that either the Special Agent or the AUSA who had represented the government in the criminal proceeding suggested that the money seized from petitioner was being held for any other purpose than due to the IRS jeopardy assessment. (DR 19 at 18, ER 0183) Further contact with the AUSA with respect to the recovery of a money clip confirmed the fact that money was not held as evidence but was not returned due to the jeopardy assessment. (DR 19 at 18, 19, ER 0183,84) These responses confirmed earlier administrative contacts with an IRS representative. (DR 19 at 19, ER 0184)

An October 25, 1995 declaration by counsel Charles H. Magnuson, relating to meetings and discussions with the Special Agent and the AUSA also confirms the lack of any a suggestion on the part of the government that petitioner's funds were being held for any purpose other than due to the IRS jeopardy assessment. (DR 16 at

6,7, ER 0147 & 48)

On September 22, 1995, two years and five months after petitioner had presented his motion for a return of his property in the criminal proceeding before Judge Davies and after being subjected to the jeopardy tax assessment, and after the filing of its answer to petitioner's complaint and admitting to payment, the government then filed a motion for summary judgement attaching an affidavit from Special Agent Jackson of the same date stating that money seized from appellant was in a safe deposit box. Nothing is stated about the money not being retained because of the tax assessment or for any other than for that purpose. (DR 8 at 12, ER 0085) Due to the summary disposition by the trial court, petitioner was never provided the opportunity to cross examine on the point about how the funds were held or the reason for so holding after the date of the jeopardy assessment.

Petitioner had filed its motion for partial summary judgement on September 22 as well, and set the hearing date for October 16, 1995. (DR 6, ER 0031) The Court continued the matter and set a new hearing date for October 30, 1995. Due to the position then taken by the government in its summary judgement motion the petitioner brought the matter to the attention of the court in the criminal proceeding and as a result the government allowed the funds to be returned under a court order adopted for this purpose in the criminal proceeding. Petitioner's supplemental reply filed on October 23,

1995 in the refund action relayed to the District Court a reference to the turn over of funds to petitioner by the Internal Revenue Service. (DR 25 at 26, ER 0212).

In retaining the funds after the jeopardy assessment IRS had collected the funds for tax purposes. But in being confronted with its duplicity the IRS capitulated by not wanting to confront the criminal proceeding with a claim of right. To have done so would have undermined and embarrassed its position in the refund action as well as created an embarrassment and the potential for sanctions with respect to its position taken two years before in the criminal proceeding that it was holding the funds because of the jeopardy assessment.

What happened was an administrative decision to release its collection rights and allow for a refund through the criminal court proceeding whereby the funds were then returned to petitioner by order from Judge Davies. In short the refund went through the criminal proceeding but was given the appearance of being a return of funds as if there had never been a tax assessment and collection.

It is submitted that the government should not be allowed to avoid its responsibility for paying interest and removing its recorded lien when as a matter of law the IRS by its action conceded that its assessment was invalid. The IRS not only released its possession

of collected taxes but in so doing did not make claim that it had a right to exercise levy powers with respect to the property when returned under the court order.

So while there was a federal tax refund there was no payment of statutory interest and the federal tax lien was not released. Then in adopting a statement proposed by the government the district Court offered no ruling as to the disclosure of tax information claim.

On appeal the Circuit Court, in not allowing for oral argument, expressed its view that the apartment seizure was not a collection or payment of taxes. This position is not consistent with the entirety of the record and is based upon findings from the lower court that were entered without benefit of a plenary proceeding. Allowing for a broader development of a record for clarifying how the collection of the subject tax resulted from the action by the IRS in having the jeopardy assessment entered against petitioner would have given petitioner his proper day in court.

Appellate court jurisdiction existed under 28 U.S.C. 1291 but in affirming the lower court dismissal without oral argument the appellate court perpetuated the lack of due process imposed upon petitioner through the summary assertion that despite having funds taken from petitioner the government for technical reasons had not accounted for a tax payment and therefore the payment requirement for bringing a refund suit did n o t e x i s t .

REASONS FOR GRANTING THE WRIT

It is submitted the circumstances require a comprehensive statement in order to reflect how unbridled administrative action has been visited upon petitioner without cause.

Lower court rulings in not allowing for cross examination or for appellate argument permitted government conduct and action to deprive petitioner of a constitutional right to due process.

In adopting a statement of uncontroverted facts submitted by the government, the trial court, while finding that substantial funds taken from petitioner remained with the IRS, the funds, by being held in a safe deposit box maintained by CID but not levied upon by the IRS Collection Division, represented a seizure of property pursuant to a search warrant and not a tax payment with respect to a tax assessment, levy or collection. Court findings referred as well to a 1995 order arising from the criminal proceeding but in doing so did not recite how circumstances transpiring between April 23, 1993 and October 12, 1995 involved the collection effort by a special agent in having a jeopardy assessment asserted against petitioner and the holding of his funds for that purpose.

It is submitted that it is this conclusion that should have been adopted

by the trial court. Such position is completely supported by what it is now discovered within the context of a second refund suit brought by petitioner. A procedure brought on through the pending second suit produced a typed report from the government discloses how the report was prepared by the revenue agent who processed the jeopardy assessment at the behest of the special agent and who dealt with handling of the administrative claim submitted by petitioner in this case. While the report was prepared by the revenue agent in response to the present claim it was never mailed to the petitioner. It states that the jeopardy assessed tax was seized and applied to the taxpayer's account.

In effect, the responsible revenue agent treated the actions of the special agent as having been a part of the tax collection process. As was done by the trial court in taking judicial notice of the criminal proceeding it is requested that judicial notice also be taken of the proceedings involving the second refund suit brought before the court by petitioner in District Court action No 96-7637-MRP(SHx), Central District of California.

Moreover, the trial court in this action also concluded that a return of the funds to petitioner within the contest of the criminal proceeding moots any action for "refund". Under this reasoning it follows that if there had been no return the matter would not have been mooted. Adopting the rationale of the trial court,

petitioner is entitled to interest and a determination that the assessment was invalid. An invalid assessment requires the release of filed liens.

Furthermore, and where the trial court made no ruling with respect to the unlawful disclosure claim, petitioner was denied due process in not having the opportunity to have this issue litigated or at least to have been afforded the opportunity as allowed by Rule 15 of the Federal Rules of Civil Procedure to amend or supplement pleadings. As such rule provides, leave to do so shall be freely given when justice so requires.

Since this case presents significant due process questions, first as to whether petitioner was precluded access to the district court on a theory that the admitted requisite payment for the pursuit of a refund suit did not exist and second as to whether there was no reference within the complaint as to an unlawful disclosure of tax return information, petitioner submits that grounds for certiorari exist.

On either point the appellate court, as had the lower court, failed to account for the conduct undertaken by the government to impose upon petitioner unwarranted damages on the pretext of no payment. Not until the appeal did the government claim surprise as to the unlawful disclosure claim which was a part of the subject complaint but not ruled upon by the trial court. It is submitted that in the treatment of the refund issue the

appellate court simply overlooked the unlawful disclosure element of the complaint. Since the refund issue presented a greater complexity of circumstances it may be that the unlawful disclosure aspects were not fully addressed. Certainly the trial court dismissal provide no guidance in this regard.

As to whether there was a payment in allowing for a refund suit it is also submitted that the government by its conduct should have been precluded from asserting to the contrary. The government through IRS personnel took money from petitioner and despite a motion for its return retained the money because of a jeopardy tax assessment. i.e. A collection seizure occurred. The assessment had of course been induced by the very agent in charge of holding the money. Only after the petitioner brought his refund suit did the government, despite answering to the contrary, bring on for summary hearing its claim that the money had not been accounted for by the IRS as a payment. When this position was asserted, petitioner sought an order within the criminal proceeding for having the money returned on the theory that the government was duplicitous in its dealing with the court.

Then and rather than even asserting lien levy rights the government in a face saving gesture refunded the money to plaintiff but did so as if payment were an aspect of the criminal proceeding. As stated, the truth of the matter is that

the funds were refunded but given the appearance as being a return within the criminal proceeding. As it happened, the lower court was so persuaded. As a result petitioner was not paid statutory interest attendant to a refund payment and the government had not released its tax lien. But even though the lien was not released the government did not exert its tax levy powers upon receipt by petitioner. In this respect there was an admission by conduct that there was no right to do so as well as an admission that if it had done so the trial court would have treated the case differently.

Had petitioner been given his proper day in court the court would have ruled upon his refund claim and would have allowed for statutory interest to be paid on the refund amount and in determining entitlement to a refund would have found the assessed tax to have been unlawful and therefor the lien would be invalid. The government precluded due process by clouding their action with the refund payment and having the trial court look upon the refund proceeding as becoming moot. Through a plenary hearing the defect in this rationale would have been developed and the appellate court would not have been confronted with a review of a summary dismissal that did not allow for a full development of a trial record.

While the government had asserted that the subject funds were being held by the IRS as evidence the jeopardy tax assessment there is no evidence of record to support such assertion. Indeed, we now find through the pendency of a subsequent

and pending refund action how discovery produced an IRS report that adopts the payment claim asserted by petitioner. It is also true that the refund claim examination report by Revenue Agent William Evans existed well before the filing by the government of its summary judgment motion and in fact had been completed before the administrative meeting in his office on August 11, 1994. Even so, the government neither submitted a supporting declaration from this agent nor had the report mailed to the petitioner. A claim denial would have operated to begin a two year limitation period for the filing of a refund suit and would have provide petitioner with the needed affirmation that assessed tax had been paid.

A consequence of the present rulings has required the petitioner to suffer the continuing economic harm of a filed tax lien, the loss of an interest recovery and the economic cost of bringing on for ruling a second refund suit. Then as to pile further harm upon injury the unlawful tax information disclosure claim has in the process been ignored.

It is for these reasons the petitioner submits that his petition confronts significant legal issues relating to the jurisdiction of the District court with respect to federal tax matters. The jurisdictional issues in turn involve the process of federal tax collection, a federal tax seizure, a federal tax payment and its significance in terms of being a full payment where a divisible federal

excise tax is assessed. See Flora v United States, 362 U.S. 145 (1960), at footnotes 37 and 38. The other issues bear upon the jurisdictional basis for prosecuting an unlawful disclosure and refund claim and the elements of estoppel created by the manner by which Appellee proceeded in responding to claims asserted by Appellant.

In any event, the two primary legal issues presented by this petition and created through conduct on the part of Internal Revenue Service representatives relate to a unlawful disclosure of tax information and the collection of federal taxes. It is submitted that an analysis of these legal issues within the factual makeup of the record is complex. It is also submitted that a plenary hearing and an oral argument on appeal would have been helpful in dealing with these significant issues. This conclusion is supported by petitioner's claim and the circumstances under which the subject taxes were collected and refunded. Petitioner also submits that support for certiorari is found in a variety of rulings.

In Barrett, Jr. v. United States, 51 F.3d 475 (5th Cir. 1995), the court explains how a disclosure is unlawful unless shown to be necessary. The United States is required to demonstrate a basis for avoiding liability for a disclosure and the severity of the disclosure is a matter of evidence. So even though the disclosure was claimed below there was no ruling upon this point. Moreover, the aspects of disclosure relate to the

formalities of Code Section 6103 and oral argument on this serious question of fact and law appears to be a reasonable means for addressing the subject. See also Husby v. United States, 672 F. Supp. 442 (ND Calif. 1987); Marre' v. United States, 38 F.3rd 823 (5th Cir. 1994); Miller v. United States, 66 F.3d 220 (9th Cir. 1995).

With respect to the tax collection issue, this case presents circumstances that even in the absence of the newly found revenue agent statement bring about a need for the application of Revenue Code Section 6331(b)(Title 26 U.S.C.). In this regard, Congress provided a broad definition as to what may constitute a levy. As result the provisions of such section provide:

> The term "levy" as used in this title includes
>
> the power of distraint and seizure by any means....

Petitioner submits that the present circumstances relate to what represents a "seizure by any means" within the meaning of such section. However read, there is a total absence of a statutory or judiciary restriction on the part of a Special Agent to aid in the proper collection of federal taxes. If there is to be found some failure to carry out a tax collection formality, that failure should not be used as a defense against the statutory right for receipt of interest by petitioner. In other respects the refusal to employ collection powers should estop the government from asserting that a refund

did not occur. See Simpson v. United States, 271 F.2d 450 (4th Cir. 1959) for authority that even funds held by a United States Marshal are not immune from levy.

The approach taken by the government in this case implies, however, that as a matter of law a special agent does not in fact participate within the collection process. On the other hand, and within another setting the government is most adamant in protecting similar conduct by raising immunity rules in order to obstruct actions for damages where special agents are involved in the federal tax collection process. It follows that the position of the government and of the court in this case is in direct conflict with prior rulings dealing with collection activities on the part of a special agent.

The immunity stance has even been asserted before courts within the Ninth Circuit in at least two cases. In Stevens v. Sassi, ___ F.Supp.___ (W.D.Wash. 1976)(77-1 USTC 86,302), the government defended conduct by two special agents as "acting pursuant to their responsibility to ascertain and collect the tax liability" and therefor being immune from suit. A similar stance was taken with respect to collection actions on the part of a special agent in Brian v. Gugin, ___ F. Supp. ___ (DC Ida. 1994)(94-1 U.S.T.C. 84,118) The trial court found that the defendant was acting within the authority authorized by Code Section 6331.(at page 84,120). While there was an appeal of the latter case, there is no published

opinion.

So in at least these two instances a chronicle of the collection activities on the part of special agents is described in court opinions. The suggestion by the government that as a matter of law a rule to the contrary is to be accepted in this proceeding is unprecedented. In this respect a decisive legal point is at issue and the ruling below involves an inherent conflict with those decisions from other courts cases upholding the position taken by the government that a special agent has federal tax collection powers and in the exercise of those powers is to be given immunity from a suit where such conduct is under attacked by other taxpayers.

In the process of not recognizing this conflict, the rationale that because a payment did not appear upon an internal booking entry there can be no payment should not be allowed to stand. A taxpayer in any instance where a payment is mailed to the IRS but somehow is not entered as such on the taxpayers tax account should not be denied the right to seek a refund where it is claimed the underlying assessment toward which the remittance is made is erroneous. Such reasoning, is, it is submitted, representative of a denial of a fundamental due process right otherwise available to a taxpayer for pursuing a Code Section 7422 refund action and complaint. FRCP Rule 56 should not have been applied to the circumstances brought about by the motion from the government for summary judgment.

The government in crafting proposed facts and conclusions that were in turn adopted by the trial court chose to be extremely selective in presenting what were offered as fact so as to present its position within a set of circumstances far from what actually occurred. Such selection is in complete contrast to those actually confronted by petitioner in trying to relate to what had been done by the Internal Revenue Service agents in disclosing actions being taken against him and then in assessing and collecting the subject taxes. A broader representation of circumstances are spelled out within his complaint through the supporting and the statutorily required claim.

It is submitted that the petitioner would have had his day in court but for application of the concept of his action being moot because of the voluntary refund. The fact of the voluntary refund ought not to be taken as a basis for denying such right. This becomes more self evident when underscored by the revelation that the government agent responsible for handling the administrative claim process accepted as a given the required element of payment. In not offering a declaration from this source an integral reference for understanding and explaining all aspects of the federal tax collection process was eliminated. This failure prevented the court and petitioner from having a comprehensive submission to the court from which an appropriate decision could have been rendered. Such failure is akin to having been subjected to situation where

evidence is suppressed and therefore being confronted with a denial of due process as was found in Brady v. Maryland, 373 U.S. 83 (1963).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

Charles H. Magnuson
Counsel of Record
10866 Wilshire Blvd.
Suite 1270
Los Angeles, CA 90024
(310) 475-0855

February 6, 1997
certpet.pld

APPENDIX "A"

(FILED: NOV - 8 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAZAR KUMPAN, Plaintiff-Appellant,	)	No. 96-55030
v.	)	D.C.No.CV-95-01321- AT(VP)
UNITED STATES OF AMERICA, Defendant- Appellee	)	MEMORANDUM[1]

Appeal from the United States District Court for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Submitted November 5, 1996[2]

Before: PREGERSON, REINHARDT, and T.G. NELSON, Circuit Judges.

Lazar Kumpan appeals the district court's dismissal for lack of subject mater jurisdiction of his action seeking a refund of federal excise tax. We affirm.

28 U.S.C. § 1346(a)(1) provides a specific grant of jurisdiction to

federal district courts over actions for the refund of any internal revenue tax improperly assessed or collected. The tax payer, however, must first pay the tax in full. See Thomas vs. United States, 755 F. 2d 728, 729 (9th Cir. 1985).

We agree with the district court that Kumpan failed to pay the excise tax. The seizure of cash from Kumpan's apartment by the Criminal Investigation Division of the IRS pursuant to a search warrant did not constitute the collection or payment of the excise tax. The seized cash was not applied to the payment of the excise tax assessment and was return to him. Accordingly, the district court properly dismissed Kumpan's action for lack of subject matter jurisdiction.

Kumpan is not entitled to an award of attorney's fees because he is not the prevailing party. See 26 U.S.C. § 7430.

AFFIRMED.[3]

---

[1] This disposition in not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[2]The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. accordingly, Kumpan's request for oral argument in denied.

[3] We reject Kumpan's contention that the district court improperly failed to rule on his claim for unlawful disclosure of tax return

information. He made no reference to such a claim in his complaint.

APPENDIX "B"

(LODGED
CLERK, U.S. DISTRICT COURT
SEP 22, 1995
CENTRAL DISTRICT OF CALIFORNIA)

(FILED
CLERK, US DISTRICT COURT
OCT 30, 1995
CENTRAL DISTRICT OF CALIFORNIA)

NORA M. MANELLA
United States Attorney
EDWARD M. ROBBINS, Jr.
Assistant United States Attorney
Chief, Tax Division
BENJAMIN DUNCAN
Assistant United States Attorney
Room 2315, Federal Building
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213) 894-6607
Fax: (213) 894-0115

Attorneys for the United States of America

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

LAZAR KUMPAN, Plaintiff, v. UNITED STATES OF AMERICA Defendant.	No. CV 95-1321 AWT(VAPx) STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

Date: October 16, 1995
Time: 10:00 a.m.
Courtroom: 2
312 North Spring St.
Los Angeles, Calif.

The motion For Summary Judgment for the United States of America came on for hearing before the Honorable A. Wallace Tashima, United States District Judge. Based on the pleadings filed in connection with the motion and all matters properly a part of the record, the Court finds the following uncontroverted facts and makes the following conclusions of law:

STATEMENT OF UNCONTROVERTED FACTS

1. As is evidenced by the Complaint and the declarations attached hereto, the "$64,367.00 representing full payment" was seized pursuant to a grand jury investigation and is still being held as evidence of criminal activity by the Criminal Division of the IRS. Complaint at p. 14-15, ¶ 11 and 12; Declaration of Denita Jackson at p. 1, ¶ 2 & 3.

2. This cash is still in a safe deposit box maintained by the Criminal Investigation Division. Declaration of Denita Jackson at p. 1, ¶ 2 & 3.

3. The Collection Division of the Internal revenue Service has not levied upon this cash (which would require that notice be sent to Plaintiff), nor has it received any payment on the outstanding

excise tax assessment against the plaintiff. Declaration of Gary Korell at p. 1, ¶ 3.

4. On March 2, 1993, Lazar Kumpan was arrested in his apartment pursuant to a Criminal Complaint. Complaint at p8, ¶ 2.

5. A search warrant was obtained by the government to search Plaintiff's apartment, vehicle and briefcase. Declaration of Denita Jackson at p. 1, ¶ 1.

6. Among the items seized as evidence of criminal activity pursuant to the search warrants was cash in the amount of $64,367. Id. at ¶ 2. The Plaintiff now alleges this same cash as "$64,367.00 in full payment." Complaint at p. 14, ¶ 11.

7. This cash has remained in a safe deposit box maintained by the Criminal Investigation Division. Declaration of Denita Jackson at p. 1, ¶ 2 & 3.

8. The Plaintiff was charged in a filed criminal complaint entitled United States v. Kumpan, Case Number 95-523M (Central District of California). This criminal complaint was dismissed without prejudice on motion of the government on March 19, 1993. Complaint at p.15, ¶ 12.

9. On April 23, 1993, the Plaintiff filed an Emergency Motion for Return of Seized Property which included a return of the cash discussed above. This motion was filed in the Central District of California and was given the case number CV 93-2371

JGD. Complaint at p. 14, ¶ 11; Declaration of Marc Harris at p. 1, ¶¶ 1-4 and Exhibit 1 attached thereto.

10. Case CV 93-2371 JGD is now closed and the property that is the subject of that case has been returned to the Plaintiff. See ¶ 6 of Conclusions of Law, below.

11. As of June of this year, an understanding has been reached between the attorney for the government, Marc Harris, and the attorney for the plaintiff, Mary F. Gibbons, that the seized documents should be returned to the plaintiff. Declaration of Marc Harris at p. 1, ¶ 5.

12. In Kumpan v. United States, Case No. CV 93-2371-JGD (Central District of Cal.), the Plaintiff specifically requested the return of all property seized by law enforcement agents. Declaration of Marc Harris at Exhibit 1, page 1 and 2 thereof.

13. Again in the Conclusion section, plaintiff requests specifically that the funds seized be returned. Id. at Exhibit 1, page 10 thereof.

14. On May 3, 1993, the Examination Division of the Internal Revenue Service made a Jeopardy Assessment against the Plaintiff for unpaid diesel fuel excise taxes in an amount in excess of $300,000 for the period ending September 30, 1992. Declaration of Gary Korell at p. 1, ¶ 2.

15. However, no payment of tax for this assessment has been collected by the Collection Division of the IRS. Id. at ¶ 3.

16. The cash which the Plaintiff alleges has been paid has not been paid against the assessment. Certificate of Assessments and Payments; Declaration of Gary Korell at p. 1, ¶ 3.

17. Any conclusions of law deemed more appropriately designated as uncontroverted fact is incorporated here as an uncontroverted fact.

CONCLUSIONS OF LAW

1. 28 U.S.C. § 1346(a)(1) is a waiver of sovereign immunity which must be construed narrowly. United States v. Dalm, 494 U.S. 596, 608 (1990); Library of Congress v. Shaw, 478 U.S. 310, 318 (1986).

2. Since no payment of the underlying excise tax has been made, the Court lacks jurisdiction over the subject matter of Plaintiff's Compliant. Flora v. United States, 357 U.S. 63, 78 S.Ct. 1079, 2 L.Ed. 2d 1165 (1958); Yuen v. United States, 825 F. 2d 244 (9th Cir. 1987).

3. 28 U.S.C. § 1346(a)(1) does not provide a waiver of sovereign immunity as to the United States in this action.

4. 28 U.S.C. § 1346(a)(1) does not provide this Court with a grant of subject matter jurisdiction for this action.

5. There being no genuine issues as to any material fact and defendant being entitled to judgment as a matter of law, defendant's motion for summary judgment is GRANTED and plaintiff's motion for summary judgment is DENIED.

6. Pursuant to Fed.R.Evid. 201, the court takes judicial notice of its own files, specifically in the action entitled *Lazar Kumpan v. The United Stated of America*, No. CV 93-2371 JGD. In that action, based on the stipulation of the parties, the court ordered on October 12, 1995, that the United States, including the Internal Revenue Service "shall return to Lazar Kumpan all property, items and monies seized from him in connection with and as part of its investigation of potential criminal violations, such return to be effected no later than October__, 1995."

7. While said order moots any action for a "refund," it does not moot plaintiff's right to interest on the refund if, in fact and in law, taxes have been assessed and a refund made.

8. As concluded above, however, the seizure of property, including cash, pursuant to a search warrant, is not an assessment, levy or other collection of taxes.

9. Based on the foregoing, judgment shall be entered consistent herewith in favor of defendant.

Dated: Oct 30, 1995

(signed) A. WALLACE TASHIMA
United States District Judge

APPENDIX "C"

(LODGED
CLERK, U.S. DISTRICT COURT
SEP 22, 1995
CENTRAL DISTRICT OF CALIFORNIA)

(FILED
CLERK, U.S. DISTRICT COURT
OCT 30, 1995
CENTRAL DISTRICT OF CALIFORNIA)

NORA M. MANELLA
United States Attorney
EDWARD M. ROBBINS, Jr.
Assistant United States Attorney
Chief, Tax Division
BENJAMIN DUNCAN
Assistant United States Attorney
Room 2315, Federal Building
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213) 894-6607
Fax: (213) 894-0115

Attorneys for the United States of America

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

LAZAR KUMPAN, Plaintiff, v. UNITED STATES OF AMERICA Defendant.	No. CV 95-1321 AWT(VAPx) JUDGMENT

Date: October 16, 1995
Time: 10:00 a.m.
Courtroom: 2
312 North Spring St.
Los Angeles, Calif.

The Motion For Summary Judgment for the United States of America came on for hearing before the Honorable A. Wallace Tashima, United States District Judge. Based on the Statement of Uncontroverted Facts and Conclusions of Law filed herein, and good cause appearing therefor,

IT IS ORDERED AND ADJUDGED

1. That 28 U.S.C. Section 1346(a)(1) does not provide this court with subject matter jurisdiction for this action; and,

2. That plaintiff's Complaint and the action are dismissed without prejudice.

DATED: OCT 30, 1995

(signed) A. WALLACE TASHIMA
UNITED STATES DISTRICT JUDGE

Presented by:

NORA M. MANELLA
United States Attorney
EDWARD M. ROBBINS, Jr.
Assistant United States Attorney
Chief, Tax Division

(signed) BENJAMIN DUNCAN

Assistant United States Attorney

Attorneys for the United States of America

APPENDIX "D" -- REVENUE AGENT INCOME TAX EXAMINATION REPORT

Form 886-A
Name of Taxpayer: Lazar Kumpan
Year/period Ended: SEPT. 30, 1992

ISSUE: Shall the claim for refund and Request for Abatement and/or the Claim for refund of Excise Taxes be allowed in full, in part, or be disallowed?

FACTS: On May 3, 1993, a jeopardy assessment was made on LAZAR KUMPAN. Information provided by C.I.D. showed that during the period July 7, 1992 through September 30, 1992, KUMPAN, in association with at least two others, had purchased a total of 933,652 gallons of diesel fuel from Cosby Oil Company, Inc. (COSBY) a distributor based in Sante Fe Springs, CA., without paying the proper excise taxes. Subsequent to the jeopardy assessment, the currency seized from KUMPAN during the execution of search warrants was levied on and applied to the outstanding tax deficiency.

KUMPAN and the other individuals involved either claimed or held themselves out to be principles of Roadway Motor Plaza, Inc. (ROADWAY), a New York state trucking firm that was expanding its operations to the West Coast. They presented various documents to COSBY, including a fraudulently obtained Form 637, Registration for Tax-Free Transactions Under Chapters 31, 32

and 38 of the Internal Revenue Code (637).

It was determined from Mr. William Burslem III, a Vice President of Travel Ports of America, Inc. (TRAVEL PORTS) that during 1992 ROADWAY had changed its name to TRAVEL PORTS and on June 17, 1992, had obtained a new Form 637 in the TRAVEL PORTS name. TRAVEL PORTS is located in Rochester, New York and does not operate west of Illinois. TRAVEL PORTS has never authorized anyone to use either its name of the Form 637 issued to ROADWAY.

Mr. Lane Evans (EVANS), the marketing manager at COSBY, stated that KUMPAN was one of the individuals who claimed to represent ROADWAY at the initial meeting held at COSBY'S office where it was arranged for ROADWAY to purchase diesel fuel from COSBY ex-tax. EVANS further stated that at this meeting, KUMPAN appeared to be the most knowledgeable of the three concerning the diesel fuel industry and the mechanics involved in purchasing, hauling, and delivery of fuel. KUMPAN instructed EVANS to "Fax" cost sheets to the ROADWAY office each morning so he, KUMPAN, would know the daily price. EVANS further stated the KUMPAN would frequently call to verify the amount of pre-payment available for ROADWAY. At the initial meeting KUMPAN gave EVANS a ROADWAY business card, listing a Los Angeles address and telephone number. The name "ALEX" was handwritten on it.

EVANS never learned ALEX's last name and only knew KUMPAN as ALEX.

There is no record that any entity know as ROADWAY had ever incorporated or otherwise been established in California. There is no EIN for this entity, nor has it or any of the individuals involved filed a Form 720, reporting the amount of excise tax due and owing.

A criminal complaint and search warrants were obtained on March 1, 1993. Approximately $60,000 was seized from a safe deposit box rented by KUMPAN and an additional $18,000 was seized from KUMPAN's residence, Due to the time restraints required to perfect a criminal case, the complaint was subsequently dismissed, but the investigation is continuing. C.I.D. has information which indicates that these individuals may be involved in a similar scheme with a different supplier.

On May 24, 1993, the taxpayer, through his representative at the time, Mary F. Gibbons, requested an administrative review of the jeopardy assessment. This review was conducted by Appeals Officer Maldeen Douglas, who fully sustained the reasoning for making the assessment and the amount of the assessment.

The Taxpayer, through his Power of Attorney, Charles Magnuson, then filed Form 843, Claim for Refund and Request for Abatement, together with Form 8849,

Claim for Refund of Excise Taxes. The Fresno Service Center received these forms on March 27, 1994 and subsequently forwarded them to the Los Angeles District. Because the assessment has not been fully paid, this is being handled as an informal claim.

RULE OF LAW: Sections 4091(b) and 4092(a) of the Internal Revenue Code, as revised December 1, 1990, imposes a $0.201 per gallon excise tax on the sale or use of diesel fuel by a producer/wholesaler or importer. IRC Section 4092(b) defines a producer as a person who elects to register under Section 4101 and who is also a wholesale distributor of diesel fuel. The Internal Revenue Service issues Form 637, Registration for Tax-Free Transaction Under Chapters 31, 32 and 38 of the Code, a document which enables as entity to purchase diesel fuel free of federal excise tax.

ARGUMENT - TAXPAYER: KUMPAN claims that he had no proprietary interest in the ROADWAY operation; that he was merely a consultant/advisor or MIER ITAEV, aka SAM RUBIN, and MARK MARTIROSIAN, who claimed to be the owner of ROADWAY. KUMPAN claims that the fact that the criminal complaint against him was dismissed proves that he is not guilty of any crime or scheme to defraud the government of excise taxes.

ARGUMENT - GOVERNMENT: Information developed in the investigation shows that KUMPAN was more than just a

consultant. He was heavily involved in the initial negotiations between COSBY and ROADWAY. According to EVANS, the sales manager at COSBY, KUMPAN, USING THE NAME ALEX, was frequently the individual who placed the ROADWAY orders. KUMPAN also arranged to have COSBY cost sheets transmitted to the ROADWAY offices on a daily basis so that ROADWAY would automatically know COSBY's daily price.

The reason that the criminal complaint was dismissed on both ITAEV and KUMPAN was due to time constraints and not whether they were guilty of innocent. The investigation is continuing.

On a weekly or bi-weekly basis, during the period July and October 1992, KUMPAN would visit has safe deposit box at the Bank of America and afterward make a cash deposit to his checking account. KUMPAN last filed a federal income tax return in 1991, in which he reported wages of $17,115 and taxable income of $916. It should be noted that the cash on which the levies were made was all seized from either KUMPAN's safe deposit box or his residence and he is the only one making a claim for he refund.

CONCLUSION: The assessment was appropriate and shall therefore not be abated. Nor will the funds seized and applied to the taxpayer's account be refunded.

APPENDIX OF AUTHORITIES

Internal Revenue Code of 1986 (26 U.S.C)

Section 6103 CONFIDENTIALITY AND DISCLOSURE OF RETURNS AND RETURN INFORMATION

(a) GENERAL RULE - Returns and return information shall be confidential, and except as authorized by this title-

(1) no officer or employee of the United States,

(2)
no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (of officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), (1)(12), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

Section 6321 LIEN FOR TAXES.

If any person liable for tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Section 6322 PERIOD OF LIEN

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse in time.

Section 6323 VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS

(a) PURCHASERS, HOLDERS OR SECURITY INTERESTS, MECHANICS' LIENOR, AND JUDGMENT LIEN CREDITORS. - The lien imposed by section 6321 shall not be valid against any purchaser, holder of security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

Section 6325 RELEASE OF LIEN OR DISCHARGE OF PROPERTY.

(a) RELEASE OF LIEN. - Subject to such regulations as the Secretary may prescribe, the Secretary shall issue a certificate of release of any lien imposed with respect to any internal revenue tax not later than 30 days after the day on which -

(1) LIABILITY SATISFIED OR UNENFORCEABLE. - The Secretary finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable; or

(2) BOND ACCEPTED. - There is furnished to the Secretary and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by such regulations.

Section 6331 LEVY AND DISTRAINT

(a) AUTHORITY OF SECRETARY. - If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the

levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) SEIZURE AND SALE OF PROPERTY. - The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (c), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

Section 6532 PERIODS OF LIMITATION ON SUITS

(a) SUITS BY TAXPAYERS FOR REFUND

(1) GENERAL RULE - No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(2) EXTENSION OF TIME - The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary.

(3) WAIVER OF NOTICE OF DISALLOWANCE - If any person files a written waiver of the requirement that he be mailed a notice of disallowance, the 2-year period prescribed in paragraph (1) shall begin on the date such waiver is filed.

(4) RECONSIDERATION OF NOTICE OF DISALLOWANCE - Any consideration, reconsideration, or action by the Secretary with respect to such claim following the mailing of a notice by certified mail or registered mail of

disallowance shall not operate to extend the period within which suit may be begun.

(5) CROSS REFERENCE - For substitution of 120-day period for the 6-month period contained in paragraph (1) in a title 11 case, see section 505(a)(2) of title 11 of the United States Code.

Section 6611 INTEREST ON OVERPAYMENTS

(a) RATE - Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.

Section 7422 CIVIL ACTIONS FOR REFUND

(a) **NO SUIT PRIOR TO FILING CLAIM FOR REFUND** - No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim of refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

Section 7431 CIVIL DAMAGES FOR UNAUTHORIZED DISCLOSURE OR RETURNS AND RETURN INFORMATION

(a) **In General-**

(1) DISCLOSURE BY EMPLOYEE OF UNITED STATES - If any officer or employee of the United Stares knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

(2) DISCLOSURE BY A PERSON WHO IS NOT AN EMPLOYEE OF UNITED STATES. If any person who is not an officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against such person in a district court of the United States.

(b) **NO LIABILITY FOR GOOD FAITH BUT ERRONEOUS INTERPRETATION-** No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

(c) **DAMAGES -** In any action brought under subsection (a), upon finding of liability on the part of the defendant,

the defendant shall be liable to the plaintiff in an amount equal to the sum of-

(1) the greater of

(A) $1,000.00 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of

(i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus

(ii) in the case of willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus

(2) the cost of the action.

(d) **PERIOD FOR BRINGING ACTION-** Notwithstanding any other provision of law, an action to enforce any liability created under this section may be brought, without regard to the amount in controversy, at any time within 2 years after the date of discovery by the plaintiff of the unauthorized disclosure.

28 United States Code

Section 1251 Original Jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of all

controversies between two or more States.

(b) the Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

Section 2101

Supreme Court; time for appeal or certiorari; docketing; stay:

***

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

***

Section 1340 INTERNAL REVENUE; CUSTOMS DUTIES

The district court shall have original jurisdiction of any civil action arising under Act of Congress providing for Internal revenue or revenue from imports or tonnage except matters within

the jurisdiction of the Court of International Trade.

Section 1346 UNITED STATES AS DEFENDANT

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 15

AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend once as a matter of course at any time before a responsive pleading is served...Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party: and leave shall be freely given when justice so requires...

(b) Amendments to Conform to the Evidence. When issues not raised by the

pleadings are tired by express or implied consent of the parties, they shall b treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to do to amend does not affect the result of the trial of these issues. If evidence is objected to at the trail on the ground that it is not within the issues made the pleadings, the court may allow the pleadings to be amended ans hall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining he party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Rule 56 SUMMARY JUDGMENT

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered in interrogatories, and pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and bin interrogating counsel shall if practicable ascertain what material facts exist, without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without the amount of damages or other relief is not in controversy, and in directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.